No. 76-815

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAMON R. APPAWORA, APPELLANT

v.

MYRON BROUGH

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of February 22, 1977, inviting the Solicitor General to express the views of the United States. It is the position of the United States that this Court should treat the papers as a petition for a writ of certiorari, grant the petition, vacate the judgment of the Utah Supreme Court, and remand the case for reconsideration in light of the decision in *Rosebud Sioux Tribe* v. *Kneip*, No. 75-562, decided April 4, 1977.[1]

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[1]The Supreme Court of Utah did not expressly rule that any federal statute interdicting state court jurisdiction was violative of the Constitution (Pet. App. A5). Under those circumstances, we question whether the appellate jurisdiction of this Court is appropriately invoked.

Ramon Appawora, an enrolled member of the Ute Indian Tribe and a resident of the Uintah and Ouray Reservation, was sued in a Utah county district court by Myron Brough, a non-Indian, for injuries arising out of an automobile accident. The accident occurred on a public county road south of Fort Duchesne, Utah, which, in the Tribe's view, lies within the exterior boundaries of the Uintah and Ouray Reservation (Pet. App. A2). Appawora failed to enter an appearance and judgment was entered against him. Alleging that the state court lacked jurisdiction over him and the subject matter, Appawora filed a motion to set aside the default judgment, which the county district court denied (Pet. App. A12).[2]

The Utah Supreme Court, by a divided vote, upheld the civil jurisdiction of the county court. After considering the Presidential Proclamation of July 14, 1905, 34 Stat. 3119, which restored unallotted land within the Uintah Reservation "to the public domain," and this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425,[3] the Utah Supreme Court apparently concluded, without explicitly stating, that the original boundaries of the Reservation had been diminished. The court also stated (Pet. App. A4) that "[t]he Ute nation, of the long-ago treaty, no longer exists, and the descendants of the inhabitants of that nation are now citizens of the United States." The court

[2]The order of the Uintah County District Court stated that the case "came on for hearing on the motion of the Ute Indian Tribe" to set aside the default judgment (Pet. App. A12). The Ute Tribe has never been a party to this action.

[3]The court also referred (Pet. App. A3) to a judgment obtained by the Ute Indians for the sale of lands previously held in Colorado (*Confederated Bands of Ute Indians* v. *United States*, 120 Ct. Cl. 609). See p. 7, *infra*.

then went on to suggest that due process requires that an enrolled Indian be "tried under the law of the land for a tort or crime committed by that Indian" (Pet. App. A5).

The holding of the Utah Supreme Court is not easily extracted from its opinion.[4] We believe, however, that the opinion, fairly read, holds that the boundaries of the Uintah and Ouray Reservation have been contracted and that the State of Utah may assert civil jurisdiction over Indians with regard to incidents occurring within that territory. We further believe that the decision is incompatible with the principles established by this Court in *Seymour* v. *Superintendent*, 368 U.S. 351; *Mattz* v. *Arnett*, 412 U.S. 481; *DeCoteau* v. *District County Court, supra*, and *Rosebud Sioux Tribe* v. *Kneip*, No. 75-562, decided April 4, 1977.

1. The principles to be applied in reservation boundary cases are well-established. In *DeCoteau* v. *District County Court, supra*, 420 U.S. at 444, this Court stated:

> This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." * * * The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " * * * Accordingly, the Court requires that the "congressional determination to terminate * * * be expressed on the face of the Act

[4]Indeed, respondent and the State of Utah, as *amicus curiae*, are in disagreement over the meaning of the opinion below. Compare Respondent's Motion to Dismiss at 3-6, with Brief of the State of Utah at 6-19.

> or be clear from the surrounding circumstances and legislative history." * * * In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government for the Indians' benefit.

In *Rosebud Sioux Tribe* v. *Kneip*, No. 75-562, decided April 4, 1977, this Court reemphasized that Indian reservations are not to be regarded as disestablished in the absence of clear congressional intent.[5]

The history of the Uintah and Ouray Reservation, read in the light of these principles, reveals no clear intention of Congress to contract the boundaries of the Reservation. By the Act of May 5, 1864, 13 Stat. 63, Congress confirmed the establishment of an Indian reservation in the "Uinta valley" of Utah as previously authorized by President Lincoln, Executive Order of October 3, 1861, 1 Kappler, *Indian Affairs*, 900 (1904). The exact demarcations of the "Uinta valley," and thus the boundaries of the Reservation, were permanently established by a survey by C. L. DuBois. See Executive Order of January 5, 1882.

The General Allotment Act of 1887, 24 Stat. 388, provided that the President could allot tracts within a reservation to individual Indians for agricultural and grazing purposes, and open the surplus reservation lands to non-Indian settlement. See *Mattz, supra*, 412 U.S. at 496. Consistent with this policy, Congress enacted several

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[5]In *Rosebud Sioux Tribe* this Court found in the surrounding circumstances and legislative history compelling evidence that three Acts of Congress had disestablished the Rosebud Reservation *pro tanto*. As we discuss in the text, the materials relied on by the Utah Supreme Court bear no relation to the materials deemed persuasive in *Rosebud Sioux Tribe*.

statutes providing for allotments on the Uintah Reservation to the Uintah and White River Utes. Act of June 10, 1896, 29 Stat. 321, 341-342; Act of June 4, 1898, 30 Stat. 429.[6] Each of these Acts required approval of either three-fourths or a majority of the adult male Indians residing on the Reservation. There was strong opposition to opening the Reservation to non-Indians and the necessary consent was never obtained. *Annual Report of the Commissioner for 1899*, p. 351.[7]

In 1902, Congress attached to the Uintah Reservation allotment statute a provision opening the Reservation to public entry, thus accommodating the westward settlement

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[6]From the trial of its establishment, the Uintah Reservation was inhabited by several different bands of Ute Indians, including the Uintahs. In 1880, the White River Utes of Colorado agreed to move to the Uintah Reservation. Act of June 15, 1880, 21 Stat. 199; *Uintah and White River Bands of Ute Indians* v. *United States*, 152 F. Supp. 953, 955 (Ct. Cl.). The Uncompahgre Utes, also of Colorado, were removed to Utah to a reservation set apart for them, but contiguous to the Uintah Reservation. Executive Order of January 5, 1882, 1 Kappler, *Indian Affairs* 901 (1904). Pursuant to the Act of June 7, 1897, 30 Stat. 62, 87, a small number of Uncompahgre Utes chose to receive allotments on the Uncompahgre Reservation while the rest of the band relocated on the Uintah Reservation. Act of March 1, 1899, 30 Stat. 924, 940. Statutes relating to the allotment of the Uintah Reservation individually referred to the Uintah, White River and Uncompahgre Utes because the Uncompahgre band was required to compensate the other bands for allotment land selected by the Uncompahgres on the Uintah Reservation. Pursuant to the Indian Reorganization Act of 1934, 48 Stat. 897, 25 U.S.C. 476, the Uintah, Uncompahgre and White River bands became established as the Ute Indian Tribe with a constitution approved by the Secretary of the Interior in 1937.

[7]The Uintah Reservation residents were aware of the effects of opening the Reservation. They had already consented to a sale to the United States, for a lump sum payment, of a small portion of land on the eastern edge of the Reservation to be restored to the public domain. Act of May 24, 1888, 25 Stat. 157. It is not contended here that this area remained a part of the Reservation.

expansion. The Act of May 27, 1902, 32 Stat. 245, 263, provided that with majority consent of the adult male Indians, allotments would be made and "all the unallotted lands within said reservation shall be restored to the public domain * * * ." Because the Utes continued to withhold consent, Congress extended the date for opening the Reservation and finally deleted the need to obtain consent prior to allotment. Act of March 3, 1903, 32 Stat. 982, 997.[8]

The Presidential Proclamation of July 14, 1905, 34 Stat. 3119, citing the 1902 Act unapproved by the Utes, then "restored to the public domain" the unallotted lands of the Uintah Reservation[9] under the method of entry and settlement set forth in the homestead laws.

Contrary to the statement of the Utah Supreme Court (Pet. App. A3-A4), the Ute Indians did not receive a lump sum payment for their unallotted tribal lands. Rather, as the land was sold, the proceeds were placed in trust by the United States to be used for the benefit of the Uintah Reservation Indians (32 Stat. 245, 263).[10] Although a

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[8]The formal date for opening the Uintah Reservation to settlement was postponed twice more. Act of April 21, 1904, 33 Stat. 189, 207; Act of March 3, 1905, 33 Stat. 1048, 1069.

[9]The name "Uintah and Ouray Reservation" for the combined area of the Uintah and Uncompahgre Reservations was not formally adopted until the Constitution of the Ute Indian Tribe, approved in 1937 ("the Ute Indian Tribe of the Uintah and Ouray Reservation * * *"). Ouray, Utah was the agency office for the Uncompahgre Reservation and the two adjoining reservations were inconsistently referred to as one for some time. Compare *Report of the Department of Interior for 1912*, Vol. II, p. 115 (Utah Reservations: Uintah Valley, Uncompahgre) with *Annual Report of the Secretary of Interior for 1934*, p. 149 (Utah Reservation: Uintah and Ouray Agency and Reservation).

[10]Under this "installment" method of payment, beneficial title to the unsold lands remained in the Indians. *Ash Sheep Co.* v. *United States*, 252 U.S. 159.

certain sum was appropriated and paid to the Uintah and White River Utes under the 1902 Act, that sum was not payment for the unallotted, opened lands but rather payment in part for those allotments selected by the Uncompahgre Indians on the Uintah Reservation and in part for that tract of land returned to the public domain under the Act of May 24, 1888, 24 Stat. 157. Furthermore, the judgment received by the Uintah and White River Utes in 1943 did not concern land on the Utah Reservation but property in Colorado belonging to the Confederated Bands of Utes and ceded to the United States in 1880 when the Ute band relocated in Utah. *Confederated Bands of Ute Indians* v. *United States*, 100 Ct. Cl. 413; 112 Ct. Cl. 123; 120 Ct. Cl. 609.

Under these circumstances, and in the absence of any assured payment for the opened lands,[11] the boundaries of a reservation should not be held to be disestablished without compelling legislative history showing that federal and tribal jurisdiction were to be displaced. The Utah Supreme Court cited no such history, and the briefs in this Court, while more extensive, are similarly unpersuasive. While Congress obviously desired to open the Reservation for settlement, there is no indication that such opening was viewed as inconsistent with continued federal jurisdiction over the original reservation.[12] Although the Utah Supreme

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[11]Although "not conclusive with respect to congressional intent" (*Rosebud Sioux Tribe* v. *Kneip*, *supra*, slip op. 4), the failure to provide for a guaranteed payment to the Tribe argues strongly against an intent to oust the Tribe and federal government from jurisdiction over the opened areas. Under such circumstances, if the lands were not sold to white settlers or if the settlers defaulted on their payments, the Indian Tribes would have been dispossessed of jurisdiction over the lands without any payment at all. This result should not be reached in the absence of compelling legislative history.

[12]See, for example, the House discussion regarding the need to define the reservation boundary lines, whether or not the reservation was opened for entry. 36 Cong. Rec. 1388 (1903).

Court seemed to give conclusive weight to the "public domain" language, this terminology was omitted in the later statutes, extending the date for opening the Uintah Reservation, which spoke of "opening the unallotted lands to public entry." Act of March 3, 1903, 32 Stat. 982, 998; Act of April 21, 1904, 33 Stat. 189, 207; Act of March 3, 1905, 33 Stat. 1048, 1069. Moreover, if the term "public domain" were meant to convert surplus lands to public lands, it would have been unnecessary to specify the method of entry and settlement in the July 14, 1905 Proclamation, because the general laws relating to public entry would automatically have applied.

After passage of the 1902 Act, Congress continued to treat the Uintah and Ouray Reservation as an undiminished reservation. Although there were references to the "former reservation" in statutes enacted immediately after the opening, that term was hardly used with consistency. See, *e.g.*, Act of June 20, 1906, 34 Stat. 325, 375. In any event, this Court has recognized such references as no more than a "natural, convenient, and shorthand way of identifying the land subject to allotment* * *." *Mattz, supra,* 412 U.S. at 498.

In 1934, Congress passed the Indian Reorganization Act which provided, in part, that undisposed of tribal lands, opened to public entry but not ceded for a sum certain, were to be restored to full tribal ownership. Act of June 18, 1934, 48 Stat. 984, Section 3. Had Congress viewed the opening of unallotted lands as the equivalent of terminating the reservation, language "returning" the surplus lands to tribal ownership would clearly have been inappropriate. Yet, the Secretary of the Interior specifically determined that the surplus lands on the Uintah and Ouray Reservation had not

been converted to the public domain, and, impliedly, that the Reservation had never been diminished. 54 I.D. 559, 562.[13]

In 1948, Congress demonstrated its recognition of the undiminished status of the Uintah and Ouray Reservation by *extending* the boundaries of the Reservation to include more than 500,000 acres, in an attempt to settle grazing disputes between Indians and non-Indians. Act of March 11, 1948, 62 Stat. 72.

Neither the 1902 Act, the 1905 Proclamation, the legislative history, nor Congressional treatment of the Uintah and Ouray Reservation express the requisite clear intent necessary to terminate the Uintah and Ouray Reservation. Even if the meaning of the 1902 Act were uncertain, which it is not, doubtful expressions in Indian legislation are to be resolved in favor of the Indians. *Choate* v. *Trapp,* 224 U.S. 665, 675; *Antoine* v. *Washington,* 420 U.S. 194, 200. The Uintah and Ouray Reservation therefore has not been disestablished.

2. Because the Supreme Court of Utah apparently believed that the Uintah and Ouray Reservation had been disestablished, its opinion contains no focused discussion

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[13]Citing this same Interior decision, in *Seymour, supra,* 368 U.S. at 357, n. 14, this Court relied on a similar construction given by the Secretary to the Colville Reservation "opening" statute. The Secretary has consistently treated the Uintah and Ouray Reservation as undiminished. See, *e.g.*, 33 I.D. 610 (opened lands were not subject to Utah's school grant privileges which applied only to public domain land); Reports of Commissioner of Bureau of Indian Affairs including unallotted lands within Uintah Reservation boundaries (1929); Order of Restoration of Secretary of Interior, returning undisposed of opened lands to "the existing reservation." 10 Fed. Reg. 12409. The Secretary's uniform recognition of reservation status is entitled to weight. *Mattz, supra,* 412 U.S. at 505.

regarding state civil jurisdiction over Indians on the Reservation. It may be appropriate to remand the case for consideration of that issue if the Court concludes that the Reservation continues undiminished. We think, however, that the State of Utah plainly lacks civil jurisdiction over Indians for acts occurring within the boundaries of the Reservation.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789.[14] In Public Law 280, Congress provided that a State could assume civil jurisdiction over Indians within Indian County,[15] but only with the consent of the affected tribe. Act of August 15, 1953, 67 Stat. 588, as amended, 82 Stat. 78, 25 U.S.C. 1321 *et seq.*[16] Without proper compliance with Public Law 280, a State may not assert its judicial power over Indians for events occurring within a reservation. *Kennerly* v. *District Court*, 400 U.S. 423, 424-425. The Ute Tribe has never given its consent to state jurisdiction.

This Court has also stated that, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (*Williams* v. *Lee*, 358 U.S. 217, 220). In our view, this is a question that the Court

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[14]Utah, in the enabling statute permitting its entrance into the Union, expressly agreed that Indian lands would remain under the control and jurisdiction of the United States. Utah Enabling Act, 28 Stat. 108. See also Utah Constitution, Art. III, Sec. 2.

[15]The definition of "Indian country," contained in 18 U.S.C. 1151, applies also to questions of civil jurisdiction. *DeCoteau, supra*, 420 U.S. at 427.

[16]Utah passed a statute obligating itself to assume jurisdiction but, recognizing the provision of Public Law 280, conditioned jurisdiction on receiving Indian consent. Utah Code Ann. §§63-36-9, 10 (1953).

would not reach because Public Law 280 is a "governing Act[] of Congress," and compliance with its terms is essential. But even aside from Public Law 280, tribal Indians should not be subjected to state court jurisdiction for torts or other occurrences within the boundaries of the Reservations, a process which would definitely impede "the right of reservation Indians to make their own laws and be ruled by them." See, *e.g.*, *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 690; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 179; *Fisher* v. *District Court*, 424 U.S. 382, 386.

The Ute Tribe has now provided a forum for a civil cause of action by a non-member against members.[17] Cf. *Schantz* v. *White Lightning*, 502 F. 2d 67, 68-70 (C.A. 8). The Due Process Clause does not forbid limiting a non-Indian's reservation-connected cause of action to a hearing in tribal court. *Morton* v. *Mancari*, 417 U.S. 535, 552-555; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463.

3. Finally, contrary to what may be inferred from the opinion of the Utah Supreme Court, the grant of citizenship to Indians does not in itself subject them to state law or erode the special rights long accorded Indians and Indian tribes. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172-173. The Ute Tribe's power to regulate its internal affairs within the Uintah and Ouray Reservation, as an exercise of its independent tribal authority, forecloses the State of Utah from asserting jurisdiction over Indians within reservation boundaries. See *United States* v. *Mazurie*, 419 U.S. 544, 557.

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[17]The Ute Tribe's Law and Order Code, Section 1-2-3, Personal Jurisdiction, asserts jurisdiction over any person "residing, located or present within the Reservation for (i) Any civil cause of action * * *." This section was enacted after the present suit was commenced.

CONCLUSION

This Court should treat the papers as a petition for a writ of certiorari, grant the petition, vacate the judgment of the Utah Supreme Court, and remand the case for reconsideration in light of the decision in *Rosebud Sioux Tribe* v. *Kneip*, No. 75-562, decided April 4, 1977.

Respectfully submitted.

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